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No. 94-558

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

RAY HAYS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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As explained in our jurisdictional statement, this Court should note probable jurisdiction in this case because it raises most of the major issues left open by *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993). Nothing in appellees' Motion to Affirm undermines that conclusion.

1. The district court's core holding was that "[r]ace-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." J.S. App. 5a. As we have argued in our jurisdictional statement (at 10-12), that holding conflicts with *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977) (*UJO*), finds no support in *Shaw*, and would apply strict scrutiny to a large number of redistricting plans at all levels of government.

Appellees offer no defense of the district court's holding that strict scrutiny applies to all race-conscious districting decisions. Instead, they contend that the district court's judgment can be affirmed without deciding that issue. According to appellees, the district court's finding that District 4 is bizarre provides an independent ground for applying strict scrutiny in this case. Mot. to Affirm 21-22.

The district court, however, did not treat the bizarre shape of a district as an independent ground for applying strict scrutiny. Instead, it viewed District 4's shape as nothing more than circumstantial evidence bearing on the question of whether the legislature had engaged in race-conscious redistricting. The court was thus able to reject persuasive objective evidence that District 4 was not bizarre (its resemblance to Old District 8) on the ground that the State "admitted that race played a large if not dominant role in the map as it is now drawn." J.S. App. 4a. The court's finding of bizarreness was therefore not independent of its core holding that all race-conscious redistricting is automatically suspect. This Court should note probable jurisdiction to review that important and incorrect decision.

2. In addition, the appropriate standard for deciding whether a district is bizarre within the meaning of *Shaw* is itself an important question that warrants this Court's review. What constitutes a bizarrely shaped district under *Shaw* is not a purely factual issue that the lower courts should be left to decide based on intuition or aesthetic reactions. This Court should establish meaningful legal standards for resolving that question.

In our jurisdictional statement, we identified several principles that should govern the inquiry whether a district is so bizarre on its face that it rationally can be understood only as an effort to segregate voters on the

basis of race, thus calling for strict scrutiny. First, we argued that a bizarre district for this purpose is one that reflects an extraordinary departure from a State's usual redistricting practices. J.S. 13. Second, we argued that the requirement that a district be bizarre "on its face" mandates an objective inquiry, not a subjective inquiry into the legislature's intent based on after-the-fact statements made by legislators. *Id.* at 15. Finally, we argued that the relevant inquiry under *Shaw* is whether the district as a whole is bizarre, not whether isolated segments of it are. *Id.* at 14 n.1.

Appellees implicitly urge a different set of standards. They believe that strict scrutiny is called for if a district deviates from certain model redistricting standards, regardless of the extent to which the State has actually employed those standards in forming districts. Mot. to Affirm 16-19. They believe that objective indications that a district is not bizarre may be discounted if the legislature admits that it intended to create a majority-minority district. *Id.* at 19-21. And their position is that a district is suspect if only isolated segments of it are bizarre. *Id.* at 19. This Court should grant plenary review to decide what set of standards should govern the decision whether to employ strict scrutiny.

3. In our jurisdictional statement, we argued that application of the proper legal standards leads to the conclusion that District 4 is not so bizarre on its face that it can be understood only as an effort to segregate voters on the basis of race. J.S. 13-17. As discussed in our jurisdictional statement (at 13-14), the most important evidence that District 4 is not bizarre in that sense is that it resembles various versions of old District 8. Appellees' principal response is that District 4 does not correspond precisely to the contours of old District 8. Mot. to Affirm 20. The relevant inquiry,

however, is not whether District 4 is exactly like other districts that have been employed in the past. Rather, the relevant inquiry is whether District 4 reflects an extraordinary departure from the State's usual redistricting practices. District 4's resemblance to various versions of old District 8 is, we believe, convincing evidence that it does not reflect an extraordinary departure from the State's usual practices.

Appellees suggest that District 4 is bizarre because it divides 12 parishes. As pointed out in our jurisdictional statement, however, redistricting plans inevitably divide parishes. The redistricting plan used by the State in the 1980s, for example, divided seven parishes. J.S. App. 65a. The number of parishes split by District 4 does not constitute such an extraordinary departure from the State's usual redistricting practices as to trigger strict scrutiny.

Appellees also assert (Mot. to Affirm 17) that District 4 is bizarre because it is 250 miles long. But other districts in the current State plan are also long. District 6 is about 200 miles long, District 5 is about 190 miles long, and District 3 is about 175 miles long. In the court's plan (J.S. App. 38a), District 4 is about 200 miles long and District 3 is about 175 miles long. When a State is relatively large, but its population is not, the State's apportionment scheme will predictably contain some large districts. There is nothing bizarre or even unusual about that.

Appellees also assert that District 4 "is not united by a meaningful commonality of interest" (Mot. to Affirm 18). But as stated in our jurisdictional statement (at 6), the record in this case contains unrebutted evidence that the population along the Red River Valley included in District 4 shares common social and economic interests. Appellees contend that "the inquiry must be whether the

District generally—not merely a portion of it—is united by a common interest." Mot. to Affirm 18. Where a congressional district must contain over 600,000 people, however, the standard proposed by appellees is unrealistic. Not surprisingly, appellees offer no evidence that the State has ever followed it. This is not a case in which only a minute percentage of the people in a district share common interests. The population along the Red River Valley included in District 4 comprises a substantial part of that district. That proof rebuts appellees' assertion that District 4 completely jettisons the State's interest in putting together people with common interests.

Finally, appellees contend that District 4 is bizarre by focusing on small areas that have odd boundaries. Mot. to Affirm 19. As we have stated, however, the proper inquiry under *Shaw* is whether the district as a whole can be considered bizarre, not whether some segments of its boundaries are irregular. See *Vera* v. *Richards*, No. H-94-0277 (S.D. Tex. Aug. 17, 1994), slip op. 91-92. Beyond that, appellees' contention ignores the evidence that some of the lines that may appear bizarre actually follow precinct lines. See J.S. 14 n.1.

4. As noted in our jurisdictional statement (at 18-20), this case also raises the question of the proper standard for determining whether a State's redistricting scheme is supported by a compelling interest in complying with the Voting Rights Act. The district court reviewed the evidence *de novo* to determine whether a second majority-minority district was compelled by the Voting Rights Act. This Court's decisions, however, permit a State to undertake remedial efforts when it *reasonably believes* that a prima facie case of a statutory violation would otherwise exist, not only when a district court

determines *de novo* that the State's belief was correct. J.S. 18.

Appellees do not offer any defense of the district court's compelling interest approach. Instead, they argue that the judgment should be affirmed because the State failed to present evidence that would demonstrate its reasonable belief that a second majority-minority district was compelled by the Voting Rights Act. When a district court has applied the wrong legal standard, however, the proper course is ordinarily to remand to the district court for it to consider the evidence under the correct standard. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-292 (1982). It is usually inappropriate for an appellate court to engage in *de novo* appellate fact-finding in these circumstances. *Ibid.*

In any event, as stated in our jurisdictional statement, the State had a sufficient basis in evidence for concluding that Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, supported the creation of a second majority-minority district. Appellees do not dispute that two of the three preconditions set forth for establishment of such a district in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), are present in this case. In particular, appellees do not deny that blacks are politically cohesive and that whites usually vote sufficiently as a bloc to defeat the minority's preferred candidates. Instead, appellees insist that the black population is not sufficiently concentrated to constitute a majority in a compact district. Mot. to Affirm 26.

As we have argued in our jurisdictional statement, however, the *Gingles* compactness requirement is satisfied when a district can be drawn that is reasonably compact in light of the State's usual practices. J.S. 19. District 4 satisfies that standard. It is similar to previous districts drawn by the State in the same

geographic area. It is also comparable in its length to other districts drawn by the State in this very plan. Appellees rely on the district court's finding that District 4 is not compact. Mot. to Affirm 26. Because that finding was made without regard to the State's actual practices, however, it is based on an improper legal standard and is erroneous.

The State also had a reasonable basis for concluding that it would be unable to satisfy its burden under Section 5, 42 U.S.C. 1973c, to show that a redistricting plan with only one majority-minority district was free of discriminatory purpose. The history of discrimination in the State, the evidence that voting remains racially polarized, and the fact that the State had previously drawn districts similar in shape and location to District 4 could have reasonably led the State to conclude that it would have difficulty showing that a failure to draw a second majority-minority district was based on legitimate redistricting considerations rather than an intent to dilute the black vote. Appellees ignore that evidence.

The State could also take into account the fact that the Attorney General had already objected to its redistricting plan for the Board of Elementary and Secondary Education (BESE), a plan that had included only one majority-minority district. The Attorney General's objection letter specifically explained that the State's BESE plan had fragmented minority concentrations among three majority white districts and that this fragmentation had not been justified in terms of neutral districting principles. See DX 16 (1993 Hearing). Appellees question the validity of the Attorney General's objection (Mot. to Affirm 24-25), but they offer no evidence that those findings were unsupportable. The State could therefore reasonably rely

on them. See *Shaw* v. *Hunt*, No. 92-202-CIV-5-BR (E.D.N.C. Aug. 22, 1994), slip op. 69 & n.34 (State may rely on Attorney General's objection unless it is clearly unsupportable).

5. Finally, this case raises the question whether a State can have a compelling interest in drawing a majority-minority district when it may not be compelled to do so under the Voting Rights Act. We believe that the State has such an interest when there is evidence that racial bloc voting by whites precludes black voters from having a realistic opportunity to elect a candidate of their choice in a majority-white district. Appellees accuse us of arguing that "the State has a compelling interest in creating two safe black districts, because if it didn't, there wouldn't be two safe black districts." Mot. to Affirm 27. That mischaracterizes our argument.

Our position is the one set forth by Justices White, Rehnquist and Stevens in *UJO*. In that case, those three Justices stated that a State is not "powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls." 430 U.S. at 167. Where such polarization exists, a State may seek to achieve a "fair allocation of political power between white and nonwhite voters." *Ibid.* None of the other Justices in *UJO* addressed that issue. And this Court in *Shaw* noted that the issue was an open one. 113 S. Ct. at 2832. This case presents an appropriate vehicle to resolve that question.

For the reasons stated in our jurisdictional statement as well as those stated herein, the Court should note probable jurisdiction.

Respectfully submitted.

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